

8.28.00.00 - DONATION

8.28.01.00 **General**

Donation is the voluntary conveyance of property, without compensation, for the improvement of a public project. Donation of real estate for highway purposes may be accepted at any time. See Sections 104.2 and 104.12 S&H Code.

8.28.01.01 **Definitions**

The following definitions apply to this procedure:

"right of way" - real estate required for State transportation purposes.

"donation" - the voluntary transfer of land title to the State at no cost or for less than full fair market value compensation.

"donor" - includes any person or nongovernmental entity that makes a donation of right of way for State transportation purposes. See Chapter 17, "Local Programs," for governmental agencies.

"dedication" - setting aside of property for public use in exchange for the granting of, for example, a building permit or zoning change variance for land use or to satisfy mitigation requirements resulting from an environmental review. Dedications are usually required through exercise of police power and without compensation.

"airspace" - real property rights above or below State highways that can be used for other purposes subject to any reservations, restrictions, and conditions necessary to ensure protection to the safety and adequacy of highway facilities and conforming to abutting or adjacent land uses.

"future airspace development rights" - the first right of refusal to enter into an airspace development lease, if the opportunity arises, at market rent to the landowner, based upon highest and best use of the site, subject to unanimous CTC approval of the economic terms of the lease.

"revenue share" for donors - that portion of revenue from an airspace development lease

payable to a donor up to a maximum of 50 percent of total revenue.

8.28.02.00 **Donation Guidelines**

- A. Donations must be voluntary and owners must be advised of their benefits under the State and Federal Uniform Acts and of their right to compensation, relocation assistance benefits, and their right to receive an appraisal report of the market value of their real property being donated. Any proposed donation must have detailed analysis of actual and potential costs to the State. A financial resume shall be prepared to confirm that State will not incur obligation, or potential obligation, to pay more than the property is worth (RAP, Goodwill, Hazardous Waste Cleanup). Any release of compensation and/or benefits by the Grantor can only be accepted under special conditions on a case-by-case basis with appropriate confirmation and documentation that State and Federal regulations are not being violated.
- B. All owners will be advised of the Department's policy of accepting voluntary donations, but the offer to donate must not in any way result from an act of coercion. The owner will be advised of this policy at the time of the first written offer.
- C. Donors shall also be advised that they may contract to reserve certain airspace development rights and revenue sharing. Any development shall be subject to approval by the Department with any reservation, restrictions, or conditions that it determines necessary for highway safety. See Section 8.28.03.00.
- D. Donations may be made at any time during the development of a prospective project. However, any document executed to effect donation prior to approval of the environmental clearance of the project shall clearly state that:
 - 1. All alternatives to a proposed alignment will be studied and considered.

2. Acquisition of property shall not influence the environmental assessment of a project including the decision relative to the need to construct the project or the selection of a specific location; and
 3. Any property acquired by gift or donation for projects covered by the Federal Highway Act, USC Section 323, shall be revested in the Grantor or successors if such property is not needed for the alignment chosen after public hearings, if required, and seven years after completion of the environmental document.
 4. If the property is conveyed by donation, the clause in Section 8.05.11.00 must be included in the Right of Way Contract.
 5. Donations will not be accepted until a hazardous waste assessment has been completed by the Environmental Branch. A copy of the hazardous waste assessment shall be kept in the parcel file for documentation. The Right of Way Contracts shall include the appropriate hazardous waste clauses. (See Section 8.16.00.00.)
- E. Once the environmental and location process requirements are satisfied and regular right of way activity is underway, donations may be accepted by the acquiring agency as part of their regular acquisition program providing the restrictions referred to above are followed.
- B. The Department shall share airspace development lease revenues pursuant to a negotiated contract with the donor including local or other governmental agencies.
 - C. Development rights and/or revenue sharing rights may be obtained only by contractual agreement when the right of way is acquired through donation and shall NOT be included as a provision of the Grant Deed. These rights must be spelled out in the Right of Way Contract pertaining to the State's acquisition of property.
 - D. Where right of way is sold to the State at less than fair market value, donor's share of the airspace development lease revenue will be determined by the following formula:

$$A = B \times C \times D$$
 Where:
 A = Donor's revenue share.
 B = Percentage of fair market value of parcel for which donor elected not to receive compensation.
 C = Donor's potential maximum share of total revenue (50 percent).
 D = Percentage of area of entire assembled airspace site generating the revenue.
 - E. Since sites may sometimes incorporate more than one donation, and the precise areas of individual developable sites will probably not have been determined at the time of the donation, reservation of future airspace development opportunities may ultimately be granted to several donors. Therefore, the opportunity to develop a site will be offered to all of the various donors. They will then have 180 days to respond to the Department in writing of their election to participate in developing the site. If a donor does not elect to participate, that shall be considered a waiver of any and all development opportunities. The Department will give each interested donor 180 days in which to submit an offer and proposal, with detailed economic terms. The offer and proposals will be analyzed by the Department. The one most advantageous to the State will be submitted to the CTC for

8.28.03.00 Reservation of Airspace Revenue and Development Opportunities

The basic operational guidelines are:

- A. Donors of transportation rights of way MAY participate in future airspace development rights to that property. Any such airspace development shall be subject to the approval of the Department and the CTC and any reservations, restrictions, or conditions they determine necessary for the safety and adequacy of highway facilities and to assure conformity with abutting or adjacent land uses.

approval of economic terms. A maximum of up to one-half of the lease revenue from the development will be distributed among the multiple donors. The share for each donor will be based on the proportion of square meter donated to the total square meter of the site and/or percentage of the donation.

- F. Future airspace development opportunities and revenue sharing cannot be sold, assigned, or transferred unless otherwise specifically provided for by contract.
- G. Negotiated contracts which provide for reservation of development opportunities must specify that a claim for inverse condemnation or any other claim will NOT be made if the transportation project is not built or a design change or future transportation project eliminates any potential airspace use.
- H. The contract will provide that total revenue available for sharing could be reduced if the FHWA should, at any time, require reimbursement.
- I. The contract must make clear that leases will be based on fair market value taking into account the highest and best use of the property rights included and require CTC approval of the economics of the lease terms.
- J. Leasing will be permitted only after the transportation project has been completed and will be conducted in accordance with existing Federal, State, local, and Departmental policies and procedures, including approval by the FHWA and CTC.

8.28.03.01 Processing

Signed transactions will be processed as follows:

- A. All contracts which provide for reservation of development rights or revenue sharing will be reviewed by HQ R/W prior to their execution.
- B. District Acquisition will notify the unit responsible for inventory of donations and R/W Engineering to ensure that right of way donated, sold at less than fair market value, will be designated as a donation on Right of

Way Record Maps and will be entered on the donations inventory.

- C. Airspace sites which were acquired through donation, or at less than fair market value, will be specially designated as such in the District Airspace inventory.
- D. Development offer and proposal processing and selection, and airspace leasing and compliance monitoring, will be conducted by District Airspace staff as outlined in the Airspace chapter.
- E. Division Airspace staff will coordinate with Division of Accounting for airspace development lease revenue share accounting and disbursements.
- F. Division Acquisition will maintain a record of the number and nature of contractual agreements entered into pursuant to the above code sections and will prepare the biennial reports to the Governor and Legislature required by this legislation. Division Airspace staff will provide to Division Acquisition staff an accounting of revenue shared on an annual basis. This information will also be included in the Right of Way Annual Report.

Where appropriate, the following clauses must be included in a Right of Way Contract or Right of Entry for development opportunities or revenue sharing:

8.28.03.02 Statement Used in Lieu of Standard Payment Clause

See Section 8.05.11.00.

8.28.03.03 **Contract Clause Where Donor to Retain Opportunity to Develop Airspace**

"It is understood and agreed that in exchange for the conveyance referred to herein, the Department of Transportation shall notify Grantor, in writing, in the event airspace becomes available for revenue producing nontransportation development purposes. Grantor shall have 180 days from issuance of said notice to respond in writing with a lease development proposal. In the event Grantor does not respond within the allotted time or notifies the Department that the opportunity is declined, Grantor waives the right to develop and the Department may proceed to the open market in accordance with established procedures to obtain revenue producing ground leases." NOTE: THIS DOES NOT PERTAIN TO TRANSACTIONS WHERE DONATIONS ARE LESS THAN TOTAL VALUE.

8.28.03.04 **Contract Clause Where Donor to Share Revenue**

"In the event the Department enters into revenue producing airspace leases using the donated property referred to above, revenue shall be shared with Grantor in accordance with established Department procedures. When an available airspace development site consists of land that was obtained through donation from more than one donor, a competitive process in accordance with the most current established Department procedures at the time of development, will be used to select the developer. Revenue sharing, if applicable, will be applied in the same proportion as the square meter of the property donation bears to the square meter of the assembled airspace lease site. Grantor understands that, notwithstanding the above, State's share will be a minimum of 50 percent of revenue collected."

8.28.03.05 **Additional Clauses for Airspace Development Opportunities and/or Revenue Sharing Contracts**

"Grantor hereby waives any claim for future inverse condemnation or damages or any other claim based on the Department's plan to build the transportation project or to change the design or review the project and thereby eliminate or reduce the potential for airspace leasing."

"Grantor understands that if the project for which the property is being acquired is constructed either totally or partially with Federal funds, the available lease revenue will be reduced in the event FHWA requires reimbursement."

"It is agreed and understood any and all opportunities may be exercised only by parties to this contract and may not otherwise be sold, assigned, hypothecated or transferred."

"Grantor understands and agrees that the opportunities to develop and/or share revenue as provided herein above, shall only become available in the event the Department adds said property to its airspace inventory."

"Grantor waives any claim for damages of any kind in the event the property is not added to said inventory."

"Airspace development leases will be allowed only after completion of construction of the transportation project and said leasing shall be conducted in accordance with existing Federal, State and Department Airspace laws, rules, regulations, procedures and policies in effect at the time of lease including approval by the FHWA and the CTC."

8.28.04.00 **Local Match for Donations**

The fair market value of donations received subsequent to the enactment of the Surface Transportation and Uniform Relocation Assistance Act of 1987 can be considered eligible as State or local matching funds whenever Federal funds participate.

The District may contract for an Independent Staff Appraisal to meet local match requirements. Section 146(a) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 provides that the fair-market value of land lawfully donated after April 2, 1987, and incorporated into the project may be used as credit toward the State or local matching share for a Federal-aid highway project. It does not apply to dedications or to donations made by an agency of the Federal, State, or Local government. The fair-market value shall be established by an appraisal made in conformity with the provisions of 49 CFR 24.103 and 24.104 subject to the following conditions:

- A. Increases and decreases in the value of the donated property caused by the project are to be excluded.
- B. The appraisal shall not reflect damages or benefits to remaining property.
- C. The fair-market value shall be established as of the date the donation becomes effective or when equitable title vests in the State, whichever is earlier. Donated land must be incorporated into the project to be eligible for credit purposes. All appraisals involving donations for credit to State or local matching funds must otherwise meet

the same standards as normal acquisition appraisals.

- D. In order to qualify for a "soft match," it must be a true donation, not an exchange of right of way for non-cash consideration. Also, the appraisal to determine the amount of credit does not include any severance damages to the remainder.

8.28.05.00 Donation Tax Information

IRS has indicated in the past that it will not rely solely on staff appraisals for donations of property exceeding \$5,000 value which are to be claimed as charitable contributions for Federal tax purposes. The owner should be advised to check with his/her tax consultant, IRS, and/or the Franchise Tax Board if this or other questions of tax implications arise.

NOTES: